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Chairman: Mr. Jeffrey Chan ..... (Singapore)

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00-49817 (E)

The meeting was called to order at 3.05 p.m.

Draft Convention on Assignment of Receivables (continued) (A/CN.9/466, 470 and 472 and Add.1-3; A/CN.9/XXXIII/CRP.2 and Add.1)

1. **The Chairman** invited the Commission to resume its consideration of the proposed text of article 4 [(3)] of the draft Convention (A/CN.9/XXXIII/CRP.2/Add.1), bearing in mind the concerns expressed by the United Kingdom.

2. **Mr. Morán Bovio** (Spain) said he thought that subparagraph (a) stated the matter very clearly: the draft Convention did not affect rights conferred under national law in real estate or in a related receivable.

3. **Mr. Deschamps** (Observer for Canada) said that the delegations of France, the United States and Canada agreed that subparagraph (a) need not refer to mortgages explicitly.

4. **Mr. Stoufflet** (France) suggested that in subparagraph (a) the verb "is" should be replaced by the verb "includes", because a right in real estate comprised certain accessory rights.

5. **Ms. Walsh** (Observer for Canada) said that she too favoured use of the verb "includes" or "carries with it", as the Drafting Group preferred.

6. **Mr. Doyle** (Observer for Ireland) said he supported the change if all agreed that that was what the Working Group had had in mind.

7. **Ms. McMillan** (United Kingdom) said that even if one used the verb "confers" the meaning was still not clear in terms of English land law.

8. **Ms. Walsh** (Observer for Canada) said that the matter was not explicitly addressed elsewhere in the draft Convention, but was bound up with the question of priority and had to be dealt with first, before the priority rule could be set out in subparagraph (b).

9. **The Chairman** said he took it that the Commission wished to adopt the revised text of article 4 (3) as set out in document A/CN.9/XXXIII/CRP.2/Add.1, subject to drafting changes.

10. *It was so decided.*

11. **Mr. Bazinas** (Secretary of the Working Group on International Contract Practices), turning to chapter IV on rights, obligations and defences, reviewed the provisions of article 13 (1), (2) and (3). Paragraph 111 of the commentary (A/CN.9/470) indicated that the words ", unless otherwise agreed," in paragraph 2 might not be necessary. Paragraph 112 explained that no reference had been made to the subjective knowledge of the parties, as had been done in article 9 (2) of the United Nations Sales Convention, because of the effect on third parties. He also pointed out that the words "receivables financing" in paragraph 3 had been placed in square brackets until a final decision was reached on the title and preamble of the draft Convention.

12. **Mr. Morán Bovio** (Spain) said that he favoured deleting the phrase "unless otherwise agreed" from article 13 (2), as suggested and retaining the text of article 13 (3) which covered the question very adequately.

13. **Mr. Salinger** (Observer for Factors Chain International) said that in article 13 (2) the expression "bound ... by any practices" might lead to uncertainty if the expression "unless otherwise agreed" was deleted. It was quite normal in a factoring agreement to state that the agreement contained all matters agreed between the two parties to the exclusion of all else.

14. **Mr. Ferrari** (Italy), supported by **Mr. Doyle** (Observer for Ireland), said that the text of article 13 (2) was fine as it stood and should not be changed. The point raised by Factors Chain International would be taken care of because the provisions of its contracts would in any case override established practices, although as a rule those practices should prevail.

15. **The Chairman** said he took it that the Commission wished article 13 to remain as drafted, with the phrase in square brackets to be dealt with subsequently.

16. *It was so decided.*

17. **Mr. Bazinas** (Secretary of the Working Group on International Contract Practices), referring to article 14 concerning the representations made by the assignor at the time of the conclusion of the contract of assignment, said that the article had been formulated as a default rule because the Working Group had decided that paragraph 1 (a) should be read in conjunction with article 11, in which case, even if there was a contractual limitation on the assignment, the assignor still had the right to assign the receivable. Paragraph 1

(c), denying any hidden defences or rights of set-off to the debtor, in essence provided that, in the absence of an agreement, the risk for hidden defences was borne by the assignor who, as contractual partner of the debtor, was in a better position to know whether the contract would be correctly implemented. The Working Group thought that such a rule would make credit less expensive than if the risk was borne by the assignee, where the higher cost would fall on the debtor and the assignor.

18. He drew attention to a number of questions, raised in paragraphs 115, 116, 119 and 120 of the commentary (A/CN.9/470), which would have to be decided by the Commission: whether a more explicit reference to representations regarding the existence of the receivable should be made in paragraph 1; whether paragraph 1 should include, in subparagraph (b), a representation that there had been no previous assignments or other transfers by law; whether paragraph 1 should include a representation that the assignor would not modify the original contract without the consent of the assignee — a rule already to be found in article 22; whether paragraph 1 should include a representation that the assignor would transfer to the assignee any non-accessory right, something which article 12 had introduced as a matter of obligation; and whether it was within the scope of the draft Convention to address the consequences of a breach of representations for the effectiveness of an assignment, a matter which might have an impact in a case of insolvency.

19. **Mr. Morán Bovio** (Spain), referring to the question raised in paragraph 115 of the commentary, said he believed that it was implicit in article 14 (1) (a) and (b) that the representations of the assignor extended to the existence, formal and substantive validity and enforceability of the receivable, although enforceability as it related to future receivables might create a difficulty under Spanish law. It might be useful to add to paragraph 1 the representations suggested in paragraph 119 of the commentary, although they were relatively implicit. The question of breach of representations referred to in paragraph 120, on the other hand, was not an implicit question and needed more thought.

20. **Mr. Doyle** (Observer for Ireland) said he believed that article 14 (1) should be left as it was. The text was the result of extensive work in past years and the Working Group had taken decisions on difficult matters. He opposed referring to a breach of representations in the draft Convention.

21. **Mr. Maradiaga** (Honduras) said that he saw no point in amending article 14 (1) (a).

22. **The Chairman** said he took it that article 14 could remain as drafted.

23. *It was so decided.*

24. **Mr. Bazinas** (Secretary of the Working Group on International Contract Practices) said that article 15 (1) ensured that the assignee could send the debtor a notification of the assignment and the payment instruction independently of the assignor, since the assignee's interest in having the notification sent might be at stake if there was inadequate cooperation between the assignor and the assignee; but that after notification, only the assignee might send a payment instruction.

25. Article 15 (2) stipulated that a notification of the assignment or payment instruction was sufficient for the purposes of article 19 to trigger the manner in which the debtor discharged the payment obligation, even though the notification or instruction might have been in breach of an agreement between the assignor and the assignee. That implied that such notification or instruction would not have an effect on the debtor's rights of set-off against the assignee — although, under article 20, the debtor could not raise against the assignee any right of set-off not available to the debtor at the time of notification — and would also in no way limit the debtor's right to modify the original contract in agreement with the assignor without the consent of the assignee. The second sentence of paragraph 2 was intended to preserve the liability of the party in breach of the agreement between the assignor and assignee, which liability might fall under law that was outside the draft Convention. It would be noted that article 15 cast notification as a right between the assignee and the assignor and not as an obligation.

26. **The Chairman** said that he took it the Commission wished article 15 to remain as drafted.

27. *It was so decided.*

28. **Mr. Bazinas** (Secretary of the Working Group on International Contract Practices) said that article 16 again elucidated a relationship between the assignor and the assignee, namely, the right to payment. It stated explicitly what had been implicit in articles 2 and 9: as

between the assignor and the assignee, the assignee had a proprietary right in the assigned receivable and any proceeds. Paragraph 1 set out the three possjbilities — payment in respect of the assigned receivable to the assignee, the assignor or a third person over whom the assignee had priority — and stipulated in each case the assignee's right to payment. Paragraph 2 established that the assignee could not retain more than the value of its right in the receivable — a provision that was particularly useful in cases of assignment by way of security, where the price of the receivable exceeded the price owed to the assignee.

29. He recalled that, in the discussion on article 6, a question had been raised as to whether returned goods should be included in the definition of proceeds, and the issue had been deferred until the discussion of articles which dealt with proceeds. Since article 16 was the first such article, the Commission might wish to revert to that question.

30. **Mr. Morán Bovio** (Spain) said that there was no need to change the definition of proceeds in article 6. He saw no problem with the current formulation of article 16, which mentioned "returned goods" along with "proceeds" where applicable.

31. **Ms. Walsh** (Observer for Canada) said that returned goods did not naturally come within the concept of proceeds and that the reference in article 6 (k) was ambiguous at best, since it provided no definition of returned goods. In article 16 (1) (c), proceeds were clearly distinct from returned goods. Since that clause was perfectly clear, there was no need to refer to returned goods a second time in article 6 (k). The last sentence of article 6 (k) should therefore be deleted. While a definition of proceeds might be necessary for the purposes of article 24, it was not necessary for the purposes of article 16.

32. **Mr. Salinger** (Observer for Factors Chain International) said that, if returned goods were not proceeds, then the draft Convention should not suggest that they were proceeds. He was satisfied with the existing wording of article 16, although it provided only that the assignee had a right to proceeds vis-à-vis the assignor. When the Commission took up article 24, it should consider the case of an assignee who received returned goods, not as proceeds, but in substitution of a cancelled receivable. Priorities in that respect should be clearly defined according to a rule of private international law.

33. **Mr. Doyle** (Observer for Ireland) said he agreed that the current wording of article 16 presented no difficulties with respect to the definition of proceeds. The question mentioned by the preceding speaker should be taken up in the discussion of article 24.

34. **The Chairman** said he took it that the Commission wished to leave article 16 unchanged but to bear in mind the points raised when it discussed article 24.

35. *It was so decided.*

36. **Mr. Bazinas** (Secretary of the Working Group on International Contract Practices) said that article 17 was intended to address the need for debtor protection. The general principle underlying it was that an assignment did not change the legal position of the debtor without the latter's consent and unless otherwise explicitly provided in the draft Convention, and that any doubt as to whether the draft Convention affected the legal position of the debtor should be resolved in favour of the debtor. Paragraph 2 of the article provided that, whatever change was effected in the debtor's legal position as a result of an assignment, the country or currency of payment could not be changed. Paragraph 2 (b) provided that the country of payment could not be changed except to the country in which the debtor was located, but paragraph 129 of the commentary suggested that even that change should be made subject to the consent of the debtor.

37. **Mr. Morán Bovio** (Spain) said that the suggestion contained in paragraph 129 of the commentary was interesting and should be reflected in the text of article 17 through the insertion of the words "unless the debtor so consents" at the end of paragraph 2 (b).

38. **Mr. Tell** (France) recalled that his Government had submitted a number of comments on the draft Convention, which were contained in document A/CN.9/472. Since the Working Group had decided that assignments to consumers were not excluded from the scope of the draft Convention, the latter must not affect the legal position of consumers. Article 17 provided that the debtor could agree to waive rights contained in the original contract, yet French law provided that consumers, as debtors protected by law, could not accept renunciation by contract of provisions reflecting public policy. In view of the last sentence of paragraph 128 of the commentary on article 17, he did not understand why that article did not contain a

reservation with respect to the implementation of consumer protection laws, as did articles 21 and 23. A new article, based on the language contained in article 21 (1), should be inserted at the beginning of chapter IV, section II, specifying that articles 17 to 23 were without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor was located.

39. **Mr. Bazinas** (Secretary of the Working Group on International Contract Practices) pointed out that the issue of consumer protection was addressed in a number of articles in chapter IV, section II. For example, article 19 (6) allowed debtors to discharge their obligations under laws outside the draft Convention; article 20 preserved all the debtor's defences and rights of set-off arising from the original contract and from any related transactions, excluding only set-offs that had not been available to the debtor at the time of notification; article 21 (1) referred explicitly to consumer protection legislation; article 22 provided for a limitation only as to the modification of the original contract after notification of the assignment; and article 23 explicitly made the recovery of payments subject to consumer protection legislation. The Working Group had taken the view that specific concerns about debtors as consumers should be addressed in the relevant provisions of the draft Convention.

40. **Mr. Franken** (Germany) said that he agreed with the representative of Spain that a reference to the consent of the debtor should be included in article 17 (2) (b).

41. **Mr. Brink** (European Federation of National Factoring Associations (EUROPAFACTORING)) said that the basic idea of article 17 was to protect debtors against unjust alterations in the original contract. In practice, factors sometimes had the opportunity to employ another factor located in the same country as the debtor, whereas the parties to the original contract had been located in different countries. In those circumstances, the Working Group had considered it useful to allow the debtor to pay the assignee in the country in which both were located, rather than forcing the debtor to make international transfers. The article should be left as it stood, since he saw no reason to change it to accommodate the very few debtors who might have an interest in sending their payments to the country in which the assignor was located. The draft Convention could not be expected to cover every minute detail of every transaction in the global economy; it was intended only to provide, in as few words as possible, practical solutions to cover most of the transactions currently carried out.

42. **Mr. Salinger** (Observer for Factors Chain International) said that he shared the views of the preceding speaker. Since the establishment of the Factors Chain International system in 1964, vast quantities of goods had flowed between countries and the receivables arising therefrom had been assigned to factors in the countries of both exporters and importers, to the benefit of both. He did not know of a single case in which a debtor had objected to that arrangement, whereby it was able to make payment in its own country. The text should not be changed, since changes might cause difficulties for a system that had operated successfully for many years.

43. **Ms. McMillan** (United Kingdom) said that she shared the views of the preceding two speakers.

44. **Mr. Winship** (United States of America) said that he saw no reason why debtors should be allowed to consent to a change in the country of payment but not to a change in the currency of payment. The indication "unless the debtor otherwise consents" should therefore apply to both 2 (a) and 2 (b), since there was no difference in the public policy reflected by those two clauses. Another problem concerned the fact that article 6 (formerly article 7) of the draft Convention did not expressly provide for party autonomy with respect to agreements between the assignee and the debtor. As a result, the words "may not" in article 17 (2) could be interpreted as excluding the possibility of party autonomy.

45. **Mr. Franken** (Germany) said that he did not see why provisions to protect the debtor should cause difficulties for the factoring industry. Paragraph 2 should indicate that the debtor's consent was required in respect of both clauses (a) and (b). He supported the position of the United States delegation.

46. **Ms. Walsh** (Observer for Canada) recalled that, under article 9, assignments of parts of receivables to more than one assignee were effective. However, article 9 did not indicate whether such assignments were effective against debtors. It could be argued, under article 17 (1), that since assignments did not affect the payment terms contained in the original contract, notifications or payment instructions from

several assignees, each claiming part of a receivable, would not be effective. However, the current wording of the draft Convention was ambiguous. The Commission must decide on a policy in that regard.

47. **Mr. Doyle** (Observer for Ireland) said that the current wording of article 17 (2) should be retained, since the proposed change was of concern to the representatives of the factoring industry.

48. **Mr. Salinger** (Observer for Factors Chain International) said, in response to the German delegation's statement that the adoption of the suggestion in paragraph 129 of the commentary should not cause problems for factors, that the purpose of the draft Convention was to make credit more widely available and less expensive. However, dealing with debtor consent in a very large number of relatively small transactions would be an administrative nightmare and would not encourage the provision of financial services to assist the movement of goods and services between countries.

49. **Mr. Tell** (France) said that party autonomy was not a reality for the consumer, who had little or no power to dictate the terms of a contract. For that reason, many national laws and European Union directives protected the consumer-debtor against unfair clauses, particularly waivers of rights and defences, by declaring them void. Although a general exception applicable to all of chapter IV, section II, might not be warranted, at least the "without prejudice" clause of article 21 could be repeated at the beginning of article 17.

50. **Ms. Mangklatanakul** (Thailand) said that, even though the draft Convention provided for consumer protection in specific articles, for the sake of the interpretation and application of the Convention, there should be a general statement on the need to protect consumers.

51. **Mr. Franken** (Germany) and **Ms. Ladova** (Observer for the Czech Republic) said that they agreed with the French proposal for a "without prejudice" clause at the beginning of article 17.

52. **Mr. Winship** (United States of America) said that his delegation doubted the wisdom of introducing a general clause on consumer protection. The Working Group had considered the issue and decided against it. The draft Convention already contained specific rules allowing mandatory consumer protection legislation to prevail in specific contexts. The most important reason, however, was that such a clause might work to the disadvantage of consumers. One of the aims of the draft Convention was to facilitate bulk assignments of consumer receivables in order to lower the cost of credit to consumers. If the consent of each credit card holder was required in order to securitize credit card debt, such transactions would be nearly impossible.

The meeting was suspended at 4.35 and resumed at 5.10 p.m.

53. **The Chairman** said that, as he understood it, the representative of France had proposed that the language on consumer protection should be removed from article 21 and other articles where it appeared and should be set out as a general principle. From a show of hands, he gathered that a large number of delegations (Australia, Austria, Cameroon, Islamic Republic of Iran, Italy, Spain, United States of America and the observers for Canada and Ireland) wished the text of article 17 to remain as it stood.

54. **Mr. Tell** (France) said that the concerns of his delegation focused on the consent of the debtor mentioned in article 17(1). Under European Union directives as well as French national legislation, the consumer could not effectively give such consent. There was also some difficulty with national legislation that prohibited the displacement of the consumer's obligation to pay from the assignor to the assignee, but that was a minor problem compared with the conflict with Community treaty obligations involving the consent issue.

55. After consultations during the suspension, he could understand the reasons why some delegations felt that language like that at the beginning of article 21 might be misinterpreted and undermine the effectiveness of article 17. As a compromise, he therefore proposed a new paragraph stating that the consent of the debtor mentioned in paragraph 1 was without prejudice to law governing the protection of the debtor.

56. In practice, the courts of the debtor's location would in any case apply consumer protection laws as a matter of public policy, in keeping with article 25 of the draft Convention, so that the consent of the consumer-debtor given in the context of article 17 would be ineffective in any case. The new paragraph would not affect the application of article 17 to commercial debtors.

57. **Mr. Renger** (Germany) said that his delegation supported the French proposal.

58. **Mr. Smith** (United States of America) said that the point, as his delegation understood it, was that, where the principle of party autonomy was overridden by consumer protection legislation in the debtor's jurisdiction, the draft Convention should respect that legislation. He would propose an alternative version of the new paragraph, which would read:

> "The Convention should not permit, in a consumer transaction, the consumer-debtor to vary or derogate from the original contract if that is not permitted under the consumer protection law of the debtor's location."

59. **Mr. Doyle** (Observer for Ireland) said he doubted whether there was a consensus for making a fundamental change to the text at such a late date. Consumer protection was not a new issue and had been debated long and hard by the Commission over several sessions and by the Working Group. His delegation favoured keeping the text of article 17 as it stood.

60. **Mr. Ferrari** (Italy) said that his delegation did not believe the international public policy approach raised by the representative of France would work well in article 17, which was a substantive law provision. The text should remain as it stood.

61. **Ms. Gavrilescu** (Romania) said that her delegation supported the French proposal in principle but would like to know whether the representative of France agreed with the United States amendment.

62. **Mr. Kuhn** (Observer for Switzerland) said that, although reluctant to change the text as it stood, his delegation could support the United States proposal, which appeared to capture the thrust of the point raised by France and address the concerns of a number of delegations.

63. **Mr. Maradiaga** (Honduras) and **Mr. Ikeda** (Japan) did not see sufficient reason for changing the text of article 17.

64. **The Chairman** said that there appeared to be support both for the French proposal and for leaving the text as it stood. Since, at the present stage of deliberations, the principle to be followed was that the text agreed upon by the Working Group should not be changed unless there was consensus in favour of amendment, the proposal could not be adopted.

65. **Mr. Herrmann** (Secretary of the Commission) said that, since work on the draft Convention would obviously not be completed during the present session, the Commission should consider two questions regarding its future work on the topic. First, it should decide whether to hold a session of the Working Group on International Contract Practices, or perhaps an ad hoc working group, prior to the next session of the Commission. Second, assuming that work on the draft Convention would be completed at the next session, the Commission should consider whether to submit the draft to the General Assembly or to a diplomatic conference, held either at Commission headquarters or in another State upon invitation.

66. **The Chairman** asked the Commission to bear in mind that if the draft Convention was referred to its next session in 2001, no progress would be made for a whole year. Moreover, very specific terms of reference would be required if the text was to be sent back to the Working Group, since the latter had already finished its work on the draft articles. As for the report of the Drafting Group, it must be considered by the Commission itself; it could not be sent directly to the Working Group.

67. **Mr. Burman** (United States of America) said there was no procedural impediment to remitting the text to the Working Group, nor would it be a sign of failure to do so. The Working Group could begin again where the Commission had left off, and it could proceed to deal with the text on the basis of the same terms of reference as before. It should preserve the language already adopted by either the Commission or the Working Group, in the absence of objection by any member State. That would enable the text to be finalized by the Commission at its next session, on the basis of a set of recommendations produced by the Working Group in December 2000. The Commission would then be in a position to submit the draft Convention to the Sixth Committee of the General Assembly, which could decide to hold a diplomatic conference to adopt it, if a country offered to host such a conference. He thought a resolution could be formulated to enable the Commission to proceed with the work on its product by either method.

68. **The Chairman** asked what was meant by the term "product". He pointed out that in the United Nations, when texts were sent back to a working group it was normally at a point when the major organ concerned had considered a text and had decided that

more work was needed on it. If the Commission now decided to remit the draft articles to the Working Group, it would be sending back text on which the Working Group had already completed its work. Another factor to be considered was the question of cost.

69. **Mr. Burman** (United States of America) explained that he had used the term "product" because of the likelihood that the Commission's work would ultimately include a commentary as well as a set of draft articles.

70. **Mr. Morán Bovio** (Spain) was in favour of sending the draft articles back to the Working Group, because a number of issues still had to be resolved. Given stricter terms of reference, the Working Group could virtually complete work on the draft articles by December 2000. As for the method of adopting the draft Convention, his delegation would prefer a diplomatic conference if there was a country willing to bear the extra cost, because the draft Convention was expected to have a significant impact, even in the developed countries. A diplomatic conference would be a means of securing an appropriate degree of publicity for the new instrument.

71. **Mr. Herrmann** (Secretary of the Commission) explained that if a diplomatic conference took place in Vienna, the seat of the Commission, the cost would be in the region of US$ 2 million and would be borne by the United Nations. If such a conference was held in a host country, that country would have to bear any additional cost, which he would estimate at approximately half a million United States dollars.

72. **Mr. Renger** (Germany) felt that the Working Group could not do much more work than it had already done on the draft articles, whatever terms of reference it might be given. The Commission had identified several outstanding issues, such as the question of location in chapter V, which the Working Group had been unable to resolve and which must be settled by the Commission itself. The Commission could not yet make a decision to convene a diplomatic conference, since it had not completed its work on the draft Convention. Moreover, it was evident from the comments by Governments on the draft Convention that the time was not yet ripe for convening a diplomatic conference.

73. **Ms. Sabo** (Observer for Canada) hoped that the Commission would demonstrate its flexibility by enabling the Working Group to continue work on the draft articles. The Group's terms of reference could be very simple, requiring it merely to proceed with the draft articles not yet reviewed by the Commission, in the light of the changes already made. There could then be another round of comments by Governments, after which the Commission could review the completed text at its next session. She supported the suggestion by the representative of the United States that the Commission should formulate a recommendation to the General Assembly which would enable the Sixth Committee to decide whether a diplomatic conference would be the appropriate forum for adopting the draft Convention.

74. **Mr. Tell** (France) observed that the Commission had now introduced many changes into the text produced by the Working Group, which bore little comparison to the draft articles in their present state. Moreover, there were still important issues to be resolved, such as those concerning location and branch offices. There was also the question of consumer protection. The Working Group had not been able to tackle that question, partly for political reasons; but if the future Convention was to win wide acceptance within the European Union, a change of mind would be necessary on the part of States which did not have advanced legislation on consumer protection. It would be also be difficult for the Working Group to proceed with a text in which all the draft articles were interdependent; account had to be taken of the impact of the changes the Commission had made to some draft articles at its current session. His delegation therefore preferred that the Commission should resume consideration of the draft Convention as a whole at its next session. As for the method of final adoption of the draft Convention, a decision at the present juncture would be premature, and should be made by the Commission at its next session.

The meeting rose at 6.05 p.m.